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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 68

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM SIMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on January 10, 1951.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 50-53) is reported at 91 F. Supp. 90. The opinion of the Court of Appeals (R. 84-88) is reported at 186 F. 2d 972.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1951 (R. 88). A petition for rehearing was denied on February 21, 1951 (R. 98). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether a seaman who is furnished prompt, proper and adequate medical care and attention during the voyage may recover consequential damages occasioned by the shipowner's non-negligent and good faith failure to make monetary maintenance and cure payments after the seaman's employment has ended by termination of the voyage.

STATUTE INVOLVED

The pertinent provisions of the Suits in Admiralty Act (41 Stat. 525, 46 U.S.C. 741 *et seq.*) are set forth in the Appendix, *infra,* pp. 21-22.

STATEMENT

This action was brought by respondent Sims against the United States under the Suits in Admiralty Act to recover maintenance and cure payments and damages for the withholding of such payments after termination of the voyage.

On September 13, 1944, Sims signed on the S.S. *William Tyler,* a vessel which was owned by the United States and managed, under a General Agency Agreement, by the Sprague Steamship Company (R. 2, 40, 43). Earlier that year,

while serving aboard another vessel, Sims had suffered from stomach illness, the result of which was to "render him unable to perform his duties for some part of the voyage" (R. 54). He did not disclose the fact of this prior sickness and disability when he shipped out on the *William Tyler* (R. 54). Throughout the voyage on the *William Tyler,* Sims continued to have trouble with his stomach, for which petitioner provided him "with prompt, proper and adequate medical care", including medical treatment at a number of ports (R. 41, 51, 54). Sims served on the *William Tyler* until termination of the voyage at Houston on January 16, 1945, when he was given a hospital slip by the captain for treatment at the Marine hospital (R. 41, 51). Shortly thereafter, and for different periods of time, Sims was hospitalized at Government expense in various Government hospitals for treatment of his stomach condition (R. 7-8, 29-30).

On June 7, 1945, Sims filed a claim under the Clarification Act of 1943 (57 Stat. 45, 50 U.S.C. App. 1291) with the Sprague Steamship Company, the general agent (R. 12-13). The claim stated that during Sims' employment on the *William Tyler* he "became ill as the result of bad food and water aboard the said vessel, resulting in [his] disability" (R. 12, 46). About two weeks later, Sims' attorneys furnished to the general agent's attorneys (who later also assisted the United States

Attorney in representing the United States in the instant action) copies of clinical abstracts from two of the Government hospitals at which petitioner had been hospitalized in March and April, 1945 (R. 7, 46). Immediately after another physical examination of Sims, on August 31, 1945, his attorneys called the attorneys for the general agent and requested payment of maintenance "to assist in effecting a cure of [Sims'] condition" (R. 11, 46).

No payments having been made, Sims instituted a civil action against the Sprague Steamship Company for maintenance and cure and for compensatory damages (85 F. Supp. 563, 564). On November 1, 1945, a companion suit in admiralty was filed against the United States, as owner of the *William Tyler* (R. 2-4). These actions were not consolidated, the suit against Sprague Steamship Company proceeding to trial first. With respect to that suit, Sims' attorneys, in a letter dated May 1, 1947 to counsel for the general agent, stated that Sims' "condition is getting continually worse, that he has been financially unable to obtain the proper foods prescribed by the doctors at the Naval Hospital" and that "serious complications will develop unless he is afforded the financial means of carrying out the program recommended by the doctors at the Naval Hospital" (R. 12).[1] The letter

[1] At the Naval Hospital, Sims had been "given a sippy diet and phenobarbital and atropine" (R. 30).

ended by urging counsel for the Sprague Steamship Company "to persuade the Sprague Steamship Company to begin the payments of maintenance and cure immediately" and by putting the Company on notice that it would be held "fully accountable for its continued failure to provide maintenance and cure in this case" (R. 12).

In the suit against the general agent, the jury returned a verdict of $2,100 for maintenance and cure, and $1,850 for compensatory damages (85 F. Supp. 563, 564). But, on August 11, 1949, as a result of this Court's decisions in *Cosmopolitan Company* v. *McAllister,* 337 U.S. 783, and *Fink* v. *Shepard S.S. Co.,* 337 U.S. 810, 815, the claim for maintenance and cure against the general agent was dismissed without prejudice to any claim Sims might make against the United States. With respect to the claim for compensatory damages, a new trial was ordered on the theory that the *Cosmopolitan* and *Shepard* decisions did not preclude an action against the ship's agent for failure to live up to its responsibility of husbanding the vessel (85 F. Supp. 563, 564). Sims, however, was also given permission to press this "broader action for damages against the government rather than against" the Sprague Steamship Company (85 F. Supp. 563, 564).

Sims accordingly prosecuted both claims in his admiralty suit against the United States, as to which he had taken no action during the pendency

of his civil suit against the general agent. As a first cause of action, the complaint in the admiralty suit alleged that the United States was "careless and negligent" in providing Sims with unsafe food and water and in failing to provide him with proper and adequate medical care and attention (R. 3). It was further alleged that by reason of such negligence, Sims "either became afflicted with neurasthenia, or a preexisting condition of neurasthenia became aggravated with resulting change in symptoms to a gastric type" (R. 5A). For a second cause of action, respondent claimed maintenance and cure for the period of his disability (R. 3). The United States answered, denying negligence and denying its liability for maintenance and cure (R. 4-6).

After the trial of the admiralty suit against the United States, the district court, in March 1950, found that Sims, while aboard the *William Tyler,* had developed and manifested gastroduodenitis which practically incapacitated him for work of the kind he had been capable of doing (R. 51). The court also found as a fact that the United States had provided Sims with (1) safe and wholesome food and water during his employment aboard the vessel, and (2) with "prompt, proper and adequate medical care and attention" during the voyage (R. 40, 41, 54). Since the gastroduodenitis persisted after his discharge from the vessel, the court, finding that in the circumstances

of the case Sims was under no legal duty to disclose his prior illness, awarded him maintenance and cure payments for each day in the period following the voyage and prior to the trial during which he was neither gainfully employed nor hospitalized (R. 48, 49, 54). The maintenance and cure payments so allowed totaled $5,254.50, at the rate of $3.50 daily for 747 days from January 19, 1945 to August 17, 1948, and at the rate of $6.00 daily for 440 days from August 18, 1948 to December 8, 1949, the date of the trial (R. 49, 54).

With respect to Sims' claim for compensatory damages for aggravation of his illness resulting from the failure to make these post-voyage payments for maintenance and cure, the district court found that if those payments had been made, Sims would have been able to avail himself of the prescribed diet and period of rest, and that his inability to avail himself of that diet and rest aggravated and prolonged his illness (R. 52). However, ruling that there was nothing to show that petitioner's refusal to make the maintenance and cure payments was not made in good faith, the court denied the claim for compensatory damages (R. 52-53). Emphasizing the fact that maintenance and cure are due in kind while aboard ship, but are commuted to money payments after termination of the voyage, the court held that the sole remedy for breach of a shipowner's duty to provide the monetary payments after termination of the voy-

age is recovery of the money due (R. 53). Any other result, the court pointed out, would increase the shipowner's burden "far beyond the limits contemplated by the maritime law if in every case in which he honestly, though perhaps mistakenly, feels that no maintenance is due, he were put to the risk of having to respond in consequential damages if he refused it" (R. 53).[2]

On appeal by Sims from the district court's denial of compensatory damages, the court below reversed.[3] It held that a refusal, even in good faith, to make monetary payments for maintenance and cure due after termination of the voyage subjects the shipowner to consequential damages caused by such non-payment (R. 86). And, stating that "Sims gave formal notice to counsel for the [United States] in June of 1945 of the need for the prompt payment for maintenance and cure in order that the medical directions given Sims for

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[2] It is significant that the compensatory damages demanded by Sims include claims for past and prospective loss of earnings which would duplicate the maintenance and cure payments allowed by the district court. For example, the compensatory damages demanded included a claim for loss of earnings for ten months and five days in 1949 at $200 a month, amounting to $2,032 (R. 49). However, the maintenance and cure payments allowed by the district court already awarded Sims maintenance and cure payments at the rate of $6.00 a day for each of the 305 days in that ten-month and five-day period (R. 48, 49). Cf. *McCarthy* v. *American Eastern Corp.*, 175 F. 2d 727, 729 (C.A. 3), certiorari denied, 338 U.S. 911.

[3] The United States did not appeal from the District Court's award of maintenance and cure payments, although it attacked the findings which led to that award (R. 85).

his recovery could be followed", the court ruled that the United States "is responsible for all the injuries suffered [by Sims] subsequent to the giving of [such] notice" (R. 85, 88).

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

1. In holding that a shipowner is liable to a seaman for consequential damages occasioned by its non-negligent and good faith failure to make monetary payments for maintenance and cure due after the seaman's employment has ended by termination of the voyage.

2. In failing to hold that a refusal, in good faith, by a shipowner to make such monetary maintenance and cure payments does not subject it to liability for any aggravation of illness resulting from that refusal.

3. In holding that in June 1945, Sims, through his attorneys, gave formal notice to counsel for the United States of the need for prompt payment for maintenance and cure in order that the medical directions given Sims for his recovery could be followed.

4. In holding that a seaman's financial inability to obtain medical treatment after termination of the voyage gives him a cause of action against the shipowner for personal injuries arising from such inability.

5. In holding that the district court erred in

denying Sims' claim for consequential damages occasioned by the shipowners' failure to make the monetary maintenance and cure payments when demanded.

ARGUMENT

The court below, in the first sentence of its opinion, recognizes that this case turns on a "novel point concerning the right of a seaman to maintenance and cure" (R. 84). Even if correct, its decision on this novel point—holding the shipowner liable for consequential damages resulting from his non-negligent and good faith failure to make monetary maintenance and cure payments falling due after the seaman's employment has ended by termination of the voyage—is, we believe, of such far reaching importance as to require review by this Court. The need for review here is underscored because the decision conflicts with well-settled principles laid down by this Court in defining the shipowner's liability for breach of his duty to provide maintenance and cure.

1. The most serious error in the decision of the court below is its failure to recognize and apply a basic distinction in the liability of a shipowner for maintenance and cure. There is no doubt that the shipowner's liability for maintenance and cure of seamen becoming ill or injured during the period of their service does not depend on the fault or negligence of the shipowner. But apart from the decision below, there also is no doubt that a ship-

owner's liability for consequential damages occasioned by his failure to provide maintenance and cure *is* predicated on the shipowner's fault or negligence.

a. Under the ancient doctrine of maintenance and cure, as applied today, any seaman who is injured or taken ill while in the service of the ship is entitled absolutely to maintenance and cure not only to the end of the voyage but for a reasonable time thereafter and until he has been cured so far as possible. *Calmar Steamship Corp.* v. *Taylor,* 303 U. S. 525; *Farrell* v. *United States,* 336 U. S. 511, 518. Like workmen's compensation laws and the shipowner's absolute liability for injuries caused by his vessel's unseaworthiness, the benefits of maintenance and cure are available to a seaman irrespective of the fault or negligence of the shipowner. As this Court has stated, the shipowner's liability for maintenance and cure "in no sense is predicated on the fault or negligence of the shipowner. Whether by traditional standards he is or is not responsible for the injury or sickness, he is liable for the expense of curing it as an incident of the marine employer-employee relationship." *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724, 730.

b. Although the duty to provide maintenance and cure "stem[s] from the contract of employment" (*Fink* v. *Shepard S. S. Co.,* 337 U. S. 810, 815) and is engrafted by law as an incident of the contractual relationship (*The Osceola,* 189 U. S.

158; *Cortes* v. *Baltimore Insular Line,* 287 U.S. 367, 371), violation of that contractual duty causing personal injuries may give rise to an action in tort. Such a tort action, however, just as a surgeon's liability for malpractice arising out of an operation or a railroad's liability for personal injuries arising out of its failure to perform its transportation contract safely, must be based on negligence or malevolence. For, in admiralty as at common law, such an action may be maintained only where there is a duty to exercise care coupled with negligence or bad faith in failing to perform that duty. See *Owners of Brig James Gray* v. *Owners of Ship John Fraser,* 21 How. 184, 194; *Sturgis* v. *Bayer,* 24 How. 110, 124; *The Perseverance,* 63 F. 2d 788 (C. A. 2), certiorari denied, 289 U. S. 744.

This principle is fully applicable to the shipowner's liability for consequential damages resulting from his failure to discharge his duty of providing maintenance and cure. Accordingly, this Court has repeatedly held that the shipowner's liability for such consequential damages is not absolute but dependent on negligence. Thus, in *The Iroquois,* 194 U. S. 240, it was the *negligent* failure of the master of the ship in not putting in at an intermediate port in order to obtain surgical treatment for an injured seaman which was held to make the shipowner liable for consequential damages suffered by the seaman because of the failure to procure the proper surgical aid. In stressing the

fact that liability was imposed only because of the negligence of the master in failing to conform to a reasonable standard of conduct by not putting in at the intermediate port, the Court pointed out that what "can be demanded of the master is the exercise of reasonable judgment" and that to judge the propriety of his conduct in a particular case "we are bound so far as possible to put ourselves in his place, and inquire whether, in view of all the circumstances, he was bound to put into an intermediate port." 194 U. S. 240, 243. And, again, in emphasizing that liability was contingent on a showing of negligence, the Court stated that "to convict the captain of negligence * * * it must be shown that he knew or should have known that the libellant could obtain proper treatment." 194 U. S. 240, 245.

Subsequent decisions by this Court under the Jones Act, which predicates liability on negligence, are in accord and make it impossible to deny that the injured seaman's derivative right to maintain an action for consequential damages for failure to provide proper maintenance and cure is limited to situation where that failure was negligent or in bad faith. *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, held that "death resulting from the *negligent* omission to furnish care or cure is death from personal injury within the meaning of the statute." (Emphasis supplied.) 287 U.S. 367, 372. Throughout his opinion, Mr. Justice Cardozo reiterated that

it was the "negligent omission" to furnish proper maintenance and cure which gave the seaman a right to consequential damages. 287 U.S. 370, 372, 375, 378. Again, in *DeZon* v. *American President Lines,* 318 U.S. 660, 669, the *Cortes* reasoning was followed and the Court pointed out that damages suffered by an injured seaman as a result of treatment by the ship's doctor, in discharging the shipowner's duty to provide proper medical treatment, are recoverable from the shipowner only if there was "negligence on the part of the ship's doctor." These cases do no more than restate the well-established principle that "damages may be recovered under the Jones Act only for negligence." *DeZon* v. *American President Lines,* 318 U.S. 660, 671; *Jamison* v. *Encarnacion,* 281 U.S. 365, 369; *O'Donnell* v. *Great Lakes Dredge & Dock Company,* 318 U.S. 36; *The Arizona* v. *Anelich,* 298 U.S. 110; *Panama R. Co.* v. *Johnson,* 264 U.S. 375. In short, while a shipowner's liability for maintenance and cure exists irrespective of negligence on his part, breach of his duty to provide adequate maintenance and cure gives rise to a tort action for consequential damages only if the breach was negligent or wilful.

c. In the instant case, there was a complete absence of any evidence or any finding which even tends to suggest negligence on the part of the Government in failing to furnish the post-voyage payments for maintenance and cure. To the contrary,

the findings of fact, the district court's opinion, and the opinion of the court below, fully establish that even though it was ultimately decided that the Government had breached its duty in failing to make maintenance and cure payments, that failure, far from being negligent, was based upon the reasonable belief that there was no legal liability on the part of the Government. The facts disclosed that Sims had suffered from stomach illness prior to his service on the *William Tyler* (R. 54). Even though that illness had temporarily disabled him, he failed to disclose the fact of this prior sickness and disability when he shipped out on the *William Tyler* (R. 54; *supra,* pp. 2-3). For Sims' continuing stomach trouble aboard the *William Tyler,* the Government afforded him "prompt, proper and adequate medical care" and a Marine hospital slip upon termination of the voyage (R. 41, 51, 54; *supra,* pp. 3, 6). But, on the assumption that he had withheld material medical facts at the time of shipping out on the *William Tyler* and the probability that the condition from which he suffered originated while he was employed by someone else, the Government resisted his claim for monetary maintenance and cure payments falling due after termination of the voyage. Such a defense, if established to the court's satisfaction, would have precluded the payment of any monetary maintenance and cure payments. *Lindquist* v. *Dilkes,* 127 F. 2d 21, 24 (C.A. 3).

In these circumstances, it is obvious that the Government was not negligent and that it acted in good faith in resisting the demand for maintenance and cure payments. The district court, in fact, specifically found that "neither negligence of the [United States] nor unseaworthy condition of the vessel was proven so far as the serving of food and water and rendering medical care and attention were concerned" (R. 41, 54). In its opinion, the district court further stated that "there is nothing to show that [the Government's position that it was not liable for the maintenance and cure payments demanded] was not taken in good faith" (R. 52). The court of appeals in effect approved these findings, when it pointed out that there was no "bad faith" on the part of the Government in resisting Sims' claim (R. 86). It did not even intimate that the Government's position was unreasonable, or negligent, or taken without adequate investigation.

Since there was no such negligence or bad faith, it is apparent that the court below has placed a greater burden on the shipowner for failure to make post-voyage payments for maintenance and cure than he would suffer for failure to provide maintenance and cure aboard ship. In the latter case, as we have shown above, the owner is liable to the seaman for consequential damages only if the court finds negligence or bad faith. But once the voyage is over, the owner can be held for conse-

quential damages, according to the court below, even though his failure to make payment was non-negligent and in good faith. This is a complete reversal of the governing principle, which, as we point out below, properly imposes heavier duties on the owner while the seaman is on the ship and unable to procure care for himself than after the termination of his employment.

Moreover, the action of the court below imposes a penalty upon the United States for seeking a judicial determination of its liability for maintenance and cure even though it had a bona-fide defense to such liability. The ruling overlooks the thoroughly settled principle that where a claim is contested in good faith no penalty, even in the form of interest, may be assessed against the defendant because he insists on having his rights determined by a court. *The Isaac Newton,* 13 Fed. Cas. 143, 146 (No. 7090; S. D. N. Y.).[4] If the right of recovery is seriously controverted in good faith, prohibition of interest, or any other penalty, is obviously necessary to avoid the injustice of punishing the defendant for defending a lawsuit. *Ogden* v. *Stevens,* 241 Ill. 556, 561, 565-566; *Sargent* v. *American Bank & Trust Co.,* 80 Oreg. 16, 39-40.[5]

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[4] In contract cases, interest is awarded not as a penalty but as part of compensation for the breach.

[5] Nor can the imposition of a penalty on the shipowner be justified on the theory that in its absence the shipowner will resist maintenance and cure payments even where he has no bona-fide defense. The availability of preferential trial listings for hardship cases would seem to be adequate protection

2. The holding of the court below that the shipowner's duty to provide maintenance and cure is no different "after termination of the voyage" than "during the voyage" (R. 87) also constitutes, we submit, serious error warranting review here.

While aboard ship, maintenance and cure are for obvious reasons due in kind. Payment of money to an injured seaman while aboard the ship in order to defray the costs of his maintenance and cure is of absolutely no benefit to the seaman. The shipowner is therefore under a duty to furnish adequate food and lodging, as well as any necessary medical or surgical treatment in kind. The seaman's safety and health, while on the vessel, are in jeopardy unless every possible inducement to masters and owners to protect that health and safety exists. Cf. *Farrell* v. *United States,* 336 U. S. 511, 516. For that reason, it is essential that the seaman have a right of action against the shipowner for consequential damages for negligent failure to furnish adequate maintenance and cure in kind aboard the vessel. *The Iroquois,* 194 U. S. 240; *Cortes* v. *Balti-*

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for seamen in such a situation. In this connection it is significant that in the instant case no attempt was made to acquaint the district court with any need for urgency nor was any attempt made to obtain a preferential trial listing. Moreover, the fact that failure to make timely maintenance and cure payments may prolong the illness and so extend the obligation to make such payments "beyond the time when it otherwise could have ended" would, by itself, seem to act as a sufficient deterrent to the shipowner's resistance of claims in the absence of a bona-fide defense (R. 53).

more Insular Line, 287 U. S. 367; *DeZon* v. *American President Lines,* 318 U. S. 660.

None of the cited cases allowing consequential damages apply to the situation in the instant case—where the claim is not for maintenance and cure in kind aboard the vessel but for monetary maintenance and cure payments falling due after termination of the voyage. When the voyage is over, the seaman's employment ends, and he leaves the ship, entirely different considerations apply. Then the seaman does have available other facilities for obtaining food, lodging and medical treatment. While the shipowner's duty to provide maintenance and cure continues for a reasonable time, with respect to injuries or diseases which manifested themselves while in the service of the ship, after termination of the voyage this duty is commuted into a definite money payment. In fact, the cost of the seaman's maintenance and cure after termination of the voyage is fixed by contract between shipowners and maritime unions. "Under existing contracts with all unlicensed personnel (AFL and CIO) the cost of the seaman's maintenance has been fixed at $6.00 per day." 4 NACCA Law Journal 232.[6] As pointed out by

[6] Thus, in the instant case, libellant was awarded maintenance and cure for the period subsequent to his discharge from his ship, exclusive of periods of hospitalization and employment, at the rate of $3.50 a day from January 19, 1945 to August 17, 1948, and at the rate of $6.00 a day for 440 days from August 18, 1948 to December 8, 1949. *Supra,* p. 7.

the district court, when the voyage has ended the shipowner's liability for maintenance and cure "is fully met by providing the seaman with money by which he can maintain himself and get needed medical attention" (R. 52). Consequently, where the shipowner fails to provide that money the seaman is not entitled to any consequential damages but his "sole remedy is the recovery of the money due" (R. 53).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MAY, 1951.

APPENDIX

Sections 1 and 2 of the Suits in Admiralty Act (Act of March 9, 1920, as amended, 41 Stat. 525, 47 Stat. 420, 46 U. S. C. 741, *et seq.*) provide as follows:

> Sec. 1. That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.
>
> Sec. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in

which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

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